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1. What types of purely contractual PPP set-ups do you know of? Are these set-ups subject to specific supervision (legislative or other) in your country?

Italian legislation recognise and regulate two PPP types.

First option is **concession**¹, which can be settled on two different schemes: i) the ordinary one (UE model) in which the financial revenue of the construction exploitation comes from third parts (users) payment (i.e. tolls); ii) PFI, in which are the same contracting bodies who pay the concessionaire for the use of the infrastructure/building (i.e. hospital, school and so on). According to Concession Green Book indications, Italian law requires that, also in this second case, the exploitation risk remain, at least in part, on the concessionaire.

In both referred schemes, the initiative can start from the public part, by publishing a notice according to concessions rules, or from privates, who can make free proposals in the framework of programmatic instruments adopted from Public Authorities (if it is so, the concession notice is published after the adoption of the proposal to be put it in concurrence for verifying if the market is able to forward better conditions).

To be underlined that concessions awarding procedures are, according to Italian legislation, regulated in the same way EU Directives requires for public works contract, so that, from this point of view, no difference exists.

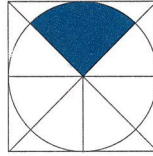
Second option is **general contracting**, which provides the implementation in the national legal framework of the widest contractual relationship considered under public works directive (execution with whatever means, of a work corresponding to the requirements specified by the contracting authority).

In fact, according to the Italian legislation, the list of tasks attached to General Contractor activity can easily bring this figure to PPP definition, as adopted in the Commission paper COM(2004) 327 final.

In fact, in addition to design and execution, General Contractor has to provide: i) the acquisition of ground area for the construction settlement; ii) the financial resources to cover the total amount or a part (untill the end of 2006 no more than 20%) of the advanced payments; iii) special co-operation in supporting Public Authorities against criminal activities infiltration; (iv) if required, expertise on the construction (subsequent) exploitation phase (which in any case only pertains to contracting authority²).

¹ Law n°109/94, artt.2, 19 and 37 bis ss; Dlgs n°190/02, artt. 7 and 8.

² The main difference between General Contracting and construction concession is that only in the second case contractors carry the exploitation risk



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A third case of PPP is **Global service** which is a not codified contract with special appliance in facility management field, which in any case, according to Italian legislation, entirely falls (as well as **outsourcing**) under services directive provisions (or works Directive if works are relevant more than services).

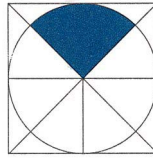
2. In the Commission's view, in the context of a purely contractual PPP, the transposition of the competitive dialogue procedure into national law will provide interested parties with a procedure which is particularly well adapted to the award of contracts designated as public contracts, while at the same time safeguarding the fundamental rights of economic operators. Do you share this point of view? If not, why not?

We all know that the final version of competitive dialogue as well as defined in 2004/18/CE directive is the outcome of a long adjustment process which can be considered, at the end, satisfactory. The problem is now how national legislation will apply the rule; in this framework, PPP green paper guide lines will be very helpful. Commission watching in order to avoid violation at national level of the Directives prescriptions true significance is expected.

Crucial is to maintain the option that "at the end of the dialogue, candidates will be invited to submit their final tender on the basis of the solution or solutions identified in the course of the dialogue. These tenders must contain all the elements required and necessary for the performance of the project".

3. In the case of such contracts, do you consider that there are other points, apart from those concerning the selection of the tendering procedure, which may pose a problem in terms of Community law on public contracts? If so, what are these? Please elaborate.

Other than selection of high importance is the awarding of the contract; should be granted, at this stage, the possibility for each selected bidders to address the final offer on the same contractual object and technical solution of the other competitors.



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4. Have you already organised, participated in, or wished to organise or participate in, a procedure for the award of a concession within the Union? What was your experience of this?

Should be noted, in principle, that Italian contractors meet many difficulties in accessing concession awarding procedures within European Union.

This situation is unsatisfactory, the more in consideration of the fact that Italian market is sensibly more open if compared with different area. This is due to the fact that Italian legislation:

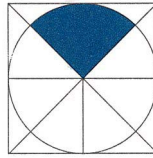
- (i) doesn't recognise special legal status to exempt services concessions from ordinary awarding procedures (in fact services concessions are treated or like services contracts, falling under 92/50 CE Directive, or like works concessions);
- (ii) treats concessions awarding procedures the same as Directives do for work contracts.

Evidence of what in above is given, for instance, by water market, which in Italy is totally opened to European concurrence, since 1994, through concessions awarding procedures, the results of which frequently is in favour of no national contractors (standing alone or in groups). Same amount of notices doesn't appear considering the rest of EC countries and this situation should be seriously inspected. The same happens on the electricity market.

In conclusion, what Italian General Contractors think on the subject is that all EC countries has to open in the same way concessions/services market to EU concurrence; the more, even when awarding procedures according to directives rules are/will be published, special care should be take, directly from the Commission, to inspect if the national legislation/local administrative procedures effectively are/remains in line with Directives requirement on the subject.

5. Do you consider that the current Community legal framework is sufficiently detailed to allow the concrete and effective participation of non-national companies or groups in the procedures for the award of concessions? In your opinion is genuine competition normally guaranteed in this framework?

Even if Directives legal framework regarding the award of concessions could be ameliorated (as already noted Italian legislation treats concessions awarding procedures the same way EC Directives does for public works contracts) the problem to be considered from the Commission in short term period is the real appliance of existing rules, case by case. This need comes not only considering



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national provisions implementing EC rules but also single contracting bodies behaviours.

6. In your view, is a Community legislative initiative, designed to regulate the procedure for the award of concessions, desirable?

Before (or in parallel of) planning a new directive, relevant efforts the Commission should devote to guarantee effective application of the ordinary principles of no discrimination and opening of the market, according to existing Directives, as specified in COM (2004) 327 def., point 30.

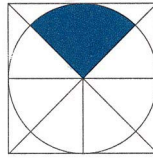
In this perspective the adoption of a “green paper” containing advises and best practices on PPP is expected; the more Commission control level should be raised, and its offices allowed to make direct intervention at national level by testing contracting authorities/body activity .

7. More generally, if you consider that the Commission needs to propose new legislative action, in your opinion are there objective grounds for such an act to cover all contractual PPPs, irrespective of whether these are designated as contracts or concessions, to make them subject to identical award arrangements?

In principle a new legislative action on PPP should cover concession awarding side; regarding work contracts, correct EC directive 18/2004 implementation at national level is sufficient.

8. In your experience, are non-national operators guaranteed access to private initiative PPP schemes? In particular, when contracting authorities issue an invitation to present an initiative, is there adequate advertising to inform all the interested operators? Is the selection procedure organised to implement the selected project genuinely competitive?

Considering PPP on private initiative ground, first should be noted that codified procedure on how to manage the awarding of such type of contract/concessions, only in few EC countries exist; as far as Directives are concerned, only “competitive dialogue” can be considered – for the future - as an European answer to such exigency to refer to.



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The practical outcome of this situation is that questions on how adequate is the level of advertising concerned when contracting Authorities decide to invite interested contractors to present private initiative only in these cases can be raised; when such codified procedures doesn't exist this kind of arguments cannot be raised because although the problem exists (even more than in the other case), it is no visible.

This relevant argument a part, according to EC rules and principles, the publication of a notice at European level should be done; the problem which still stands is at what stage of the procedure should be better to do so.

According to a point of view, publication could be done once the contracting authority has decided if the proposal (initiative) is acceptable under public interest view; then rise the exigency to put the proposal on the market to verify, from the contracting body/authority if the proposed conditions can be improved.

A different idea is of publishing the notice at an earlier stage of the procedure, for instance when the contracting authority decides to ask the market for a PPP (the model could be the competitive dialogue procedure).

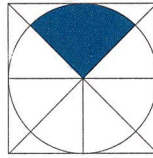
Last approach doesn't solve the problem of how to treat the right of the private sector to make a proposal to a contracting authority and how give to it the right recognition.

In any case should be accepted that one publication (only) at European level of the awarding procedure should be sufficient even if the procedure is settled on different steps.

9. In your view, what would be the best formula to ensure the development of private initiative PPPs in the European Union, while guaranteeing compliance with the principles of transparency, non-discrimination and equality of treatment?

Competitive dialogue could be an option.

As an alternative, private sector should be, in principle, free to make proposals on PPP initiative to contracting authorities/bodies; even if only at a preliminary level, proposal should be well defined and complete; as far as the proposal is accepted the contracting authority should put it on the market with an awarding procedure according to EC rules for verifying if economical and/or technical conditions can be improved; special clauses of protection (such as preference) for the "proposer" of the initiative (to guarantee private interest to make proposal) and for contractors taking part to market-verification (such as a "loser fee") should jointly be adopted to complete the legal framework of the system.



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10. In contractual PPPs, what is your experience of the phase which follows the selection of the private partner?

According to Italian legislation, a formal awarding procedure like EC Directive provides for public works contract applies; at this stage clauses of preference and looser fee also apply.

11. Are you aware of cases in which the conditions of execution – including the clauses on adjustments over time – may have had a discriminatory effect or may have represented an unjustified barrier to the freedom to provide services or freedom of establishment? If so, can you describe the type of problems encountered?

Condition of execution, namely from the technical side, can strongly interfere with the final choice of the contractor.

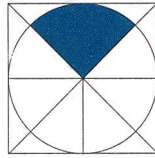
12. Are you aware of any practices or mechanisms for evaluating tenders which have a discriminatory effect?

13. Do you share the Commission's view that certain "step-in" type arrangements may present a problem in terms of transparency and equality of treatment.? Do you know of other "standard clauses" which are likely to present similar problems?

Step in clauses are mostly requested from banks and insurance companies in order to minimise the risk of financial exposures in PPP initiative, where private finance contribution is requested.

In this framework such clauses are, in principle, useful and can be accepted as well as no problems on transparency and/or equal treatment arise; in this sense should be considered that, according to Italian legislation, step in clauses apply only for concessions, to replace by banks contractors, chosen after a formal awarding procedure according to EC Directives, in default.

14. Do you think there is a need to clarify certain aspects of the contractual framework of PPPs at Community level? If so, which aspects should be clarified?



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Please refer to what has been said in point 8 and 9 on private initiative PPP

15. In the context of PPPs, are you aware of specific problems encountered in relation to subcontracting? Please explain.

In this context no particular problems arise.

Of course, as well as it happens for every type of contract, limitations on this side (i.e. in the amount of the subcontract accepted by the client or in subcontractors choice) are not in line with (main) contractors needs.

This approach is (if possible) more relevant when you consider such complex and large tasks(execution with what ever means) committed to a contractor which is the real reason of using PPP by contracting authorities/bodies.

16. In your opinion does the phenomenon of contractual PPPs, involving the transfer of a set of tasks to a single private partner, justify more detailed rules and/or a wider field application in the case of the phenomenon of subcontracting?

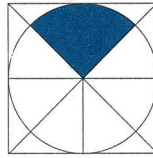
According to above (point 15) the wideness of tasks committed to contractors assuming PPP requires wider field in which subcontracting has to be admitted.

17. In general, do you consider that there is a need for a supplementary initiative at Community level to clarify or adjust the rules on subcontracting?

Not in principle. The definition of execution whit whatever means which is the legal basis of PPP seems, at least at European level, sufficient to justify the right approach on this issue.

18. What experience do you have of arranging institutionalised PPPs and in particular, in the light of this experience, do you think that Community law on public contracts and concessions is complied with in such cases. If not, why not ?

The Italian legislation impose the publication of a notice for the selection of the private partner in case of institutionalised PPP. Problems can arise only considering the qualification requested to enter this special kind of procedure for



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the choice of a partner. At European level (EC Directives) no regulation on this matter exists, but Commission evaluations on the fact that *participation of the contracting body in the mixed entity, which becomes the joint holder of the contract at the end of the selection procedure, does not justify not applying the law on public contracts and concessions when selecting the private partner* have to be shared.

In fact, in many cases institutionalised PPP seems to be finalised more to bypass EC Directives than for searching real alternatives to concessions or (more simple) works contracts. That's the reason why, according to Commission paper *the conditions governing the creation of the entity must be clearly laid down when issuing the call for competition for the tasks which one wishes to entrust to the private partner*. ; in fact when those tasks are the execution (design and execution or execution by whatever mean) of a public works contract, corresponding Directives should in any case apply.

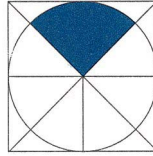
19. Do you think that an initiative needs to be taken at Community level to clarify or define the obligations of the contracting bodies regarding the conditions requiring a call for competition between operators potentially interested in an institutionalised project? If so, on what particular points and in what form ? If not, why not?

Of course such an initiative should be taken. Contracting authorities/bodies purpose of selecting a private partner should be at least published at European level. Qualification requested to bidder for accessing the procedure should be coherent with the tasks to be committed to the private sector: if those task refers to activities falling under works directive, all the contents of this Directive should apply, .

20. In your view which measures or practices act as barriers to the introduction of PPPs within the European Union?

The risk of losing control, specially from contracting authorities, on each (potential) single part of a PPP contract (conception, financing, works execution, supply, management once the project is completed and so on) seems to be the highest barrier, at European and national level, for PPP development.

Another relevant problem depends on the incertitude of the legal framework, which discourage private finance in accessing public works initiative.



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21. Do you know of other forms of PPPs which have been developed in countries outside the Union? Do you have examples of “good practice” in this framework which could serve as a model for the Union? If so, please elaborate.

22. More generally, given the considerable investments needed in certain Member States in order to pursue social and sustainable economic development, do you think a collective consideration of these questions pursued at regular intervals among the actors concerned, which would also allow for the exchange of best practice, would be useful? Do you consider that the Commission should establish such a network?

Such kind of initiative should be highly welcome.